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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ROMEO BALBIN DURLAO, JR.,
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13 Petitioner,

14 vs.
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18 SCOTT KERNAN, Secretary,
19 Respondent.
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CASE NO. 13cv1190-MMA (JLB)

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE;**

[Doc. No. 98]

**DENYING FIRST AMENDED
PETITION FOR WRIT OF
HABEAS CORPUS;**

[Doc. No. 87]

**DENYING PETITIONER'S
MOTIONS FOR EVIDENTIARY
HEARING AND DISCOVERY**

[Doc. Nos. 95, 97]

21 Petitioner Romeo Balbin Dumlao, Jr., a state prisoner proceeding *pro se*, has
22 filed a first amended petition for writ of habeas corpus ("petition") pursuant to Title
23 28, United States Code, section 2254, challenging his June 10, 2010 conviction for
24 gross vehicular manslaughter while intoxicated, with sentencing enhancements for
25 infliction of great bodily injury. *See* Doc. No. 87. Petitioner also requests an
26 evidentiary hearing and leave to conduct discovery. *See* Doc. Nos. 95, 97. These
27 matters were referred to United States Magistrate Judge Jill L. Burkhardt for
28 preparation of a Report and Recommendation pursuant to Title 28, section

1 636(b)(1), and Civil Local Rule HC.2. Judge Burkhardt has issued a thorough and
 2 well-reasoned Report recommending that all relief requested by Petitioner be denied.
 3 *See* Doc. No. 98. Petitioner objects to the Report and Recommendation on various
 4 grounds. *See* Doc. No. 103.

5 Pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. §
 6 636(b)(1), the Court must “make a *de novo* determination of those portions of the
 7 report . . . to which objection is made,” and “may accept, reject, or modify, in whole
 8 or in part, the findings or recommendations made by the magistrate [judge].” 28
 9 U.S.C. § 636(b)(1); *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir.
 10 1989). The Court has conducted a *de novo* review of those portions of the Report to
 11 which Petitioner objects and finds his objections to be without merit and immaterial
 12 to the ultimate resolution of the issues raised in his petition.¹

13 Accordingly, the Court concludes the Judge Burkhardt issued an accurate
 14 Report and well-reasoned recommendation that the petition be denied. The Court
 15 **OVERRULES** Petitioner’s objections and **ADOPTS** the Report and
 16 Recommendation in its entirety. The Court **DENIES** the petition with prejudice and
 17 **DENIES** Petitioner’s motions for an evidentiary hearing and discovery.

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 21 ¹ With respect to Petitioner’s argument regarding his trial counsel’s failure to
 22 challenge the sentencing enhancements for great bodily injury, Petitioner cites *People*
 23 *v. Weaver*, 149 Cal. App. 4th 1301 (2007). The Court notes that *Weaver* was expressly
 24 disapproved recently by the California Supreme Court in *People v. Cook*, 60 Cal.4th
 25 922 (2015), in which the court held that under California Penal Code section
 26 12022.7(g), “great bodily injury enhancements simply do not apply to murder or
 27 manslaughter.” *Id.* at 935. At least one state appellate court has applied *Cook*’s holding
 28 to grant collateral relief and vacate a defendant’s sentence that included great bodily
 injury enhancements related to his conviction of vehicular manslaughter while
 intoxicated, despite the finality of that conviction. *See In re Julian*, 2016 Cal. App.
 Unpub. LEXIS 809 (Cal. App. 4th Dist. Feb. 1, 2016). Petitioner has not challenged
 his sentence based on the California Supreme Court’s holding in *Cook* in these
 proceedings. As such, it is not for this Court to say whether he would be entitled to any
 such relief. However, Petitioner may seek relief on these grounds via a writ of habeas
 corpus in state court. It would, of course, be incumbent on Petitioner to adequately
 explain and justify his failure to present the claim in his prior state court petitions. *See*
In re Clark, 5 Cal.4th 750, 774-775 (1993).

CERTIFICATE OF APPEALABILITY

The Clerk of Court is instructed to enter judgment accordingly and close the case.

DATED: March 28, 2016

Hon. Michael M. Anello
United States District Judge